

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-40005

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-4005
77-4020
77-4059

INTERNATIONAL BUSINESS MACHINES CORPORATION,
et al., Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA, Respondents,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,
Intervenors.

ON PETITIONS FOR REVIEW OF REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

1. Whether the Commission properly construed its own rules and regulations when it determined that the Dataspeed 40/4 service was a communications service which could be lawfully tariffed under the Communications Act.

2. Whether the Commission properly declined to suspend or investigate the Dataspeed 40/4 filing, having determined that Dataspeed 40/4 was a communications service properly tariffable under the Communications Act and that the accompanying supporting material satisfied the requirements of Commission rules.

COUNTERSTATEMENT

Petitioners in these consolidated cases seek review of a Federal Communications Commission Order which authorized intervenor American Telephone and Telegraph Company to file revisions to its tariffs in order to upgrade its existing data communications services by offering an improved data terminal, the DATASPEED 40/4, in conjunction with various transmission facilities.^{1/} This Court has jurisdiction pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2342.

I. Historical Background.

A. 1971 Computer Inquiry.

In the 1960's communications common carriers increasingly began to utilize large capacity centralized computers in order to more efficiently perform message and circuit switching functions. The carriers also realized that during off peak periods their computers would not be used to full capacity, and that it would be possible to derive additional revenue by selling their "off-peak" and "back-up" computer capacity for use in data processing service applications. The situation which arose was concisely summarized by this Court in GTE Service Corp. v. FCC, 474 F.2d 724, 728 (2d Cir. 1973):

^{1/} The Order under review is entitled American Telephone and Telegraph Company - Revisions to Tariffs FCC Nos. 260 and 267 Relating to DATASPEED 40, FCC-1199, released January 5, 1977 (J.A. 969).

Because the nature of the telephone business necessitates the use of large communications computers to handle peak periods of traffic, the considerable excess capacity existing in off-peak hours can be utilized to perform data processing functions. Likewise, surplus computer time may be available on those "in-house" machines generally used to satisfy a telephone company's data processing needs.

The marketability of this excess computer capacity, and the growing interaction of the computer and communications industries have attracted common carriers to the computer service field. This in turn has aroused the concern of the FCC.

The Commission's concern was manifested in a Notice of Inquiry in Docket 16979, 7 FCC 2d 11 (1966), and a Supplemental Notice of Inquiry in Docket 16979, 7 FCC 2d 19(1967), which initiated a general investigation into the interdependence of computer and communication services. Over sixty parties responded to the notices and to a subsequently issued Report and Further Notice of Inquiry in Docket 16979, 17 FCC 2d 587 (1969). This was followed by a Tentative Decision in Docket 16979, 38 FCC 2d 291 (1970), which was subsequently incorporated with certain modifications into a Final Decision and Order in Docket 16979, 28 FCC 2d 267 (1971), reconsideration denied, 34 FCC 2d 557 (1972).

The Commission found that there was a close and intimate relationship between data processing and communications

services, (and their respective technologies as well) and that this interdependence will continue to increase. Computer data processing service increasingly depends upon the use of communications services, and communications services and and communications systems rely upon increasingly greater use of computers for switching and other communications-related functions. Final Decision and Order in Docket 16979 28 FCC 2d at 269. Having found the close and mutual relationship between common carrier service, and data processing service and computer technology, the Commission determined that without appropriate regulatory safeguards, "the provision of data processing services by common carriers could adversely affect the statutory obligation of such carriers to provide adequate communications services under reasonable terms and conditions and impair effective competition in the sale of data processing services." Ibid.

The Commission concluded that the best method of regulation was to avoid the extremes of an absolute prohibition of communications common carriers' furnishing computer services, directly or indirectly, and the regulation of the data processing industry as such. The middle ground found by the Commission was based upon the concept of achieving "a maximum separation" of data processing service from communications service. 28 FCC 2d at 269.

The Commission recognized that the terms of the Act and definitions utilized by the data processing community were not sufficiently precise for regulatory purposes, and so it undertook, at 28 FCC 2d at 295-96, to define the following terms for its own needs:

(a) "Data processing" is the use of a computer for the processing of information as distinguished from circuit or message-switching. "Processing" involves the use of the computer for operations which include, inter alia, the functions of storing, retrieving, sorting, merging and calculating data, according to programmed instructions.

(b) "Message-switching" is the computer-controlled transmission of messages, between two or more points, via communications facilities, wherein the content of the message remains unaltered.

(c) "Local Data Processing Service" is an offering of data processing wherein communications facilities are not involved in serving the customer.

(d) "Remote Access Data Processing Service" is an offering of data processing wherein communication facilities, linking a central computer to remote customer terminals, provide a vehicle for the transmission of data between such computer and customer terminals.

(e) "Hybrid Service" is an offering of service which combines Remote Access data processing and message-switching to form a single integrated service.

The rules adopted to maintain "maximum separation" were essentially as follows: (1) no common carrier shall furnish data processing services to others except through a separate corporate entity which must maintain its own books of account, have separate officers, employ separate operating personnel, and utilize separate computing equipment and facilities; (2) all contracts, agreements and arrangements between the carrier and such separate corporation must be filed with the Commission within thirty days; (3) a carrier cannot sell or promote the data processing services of the separate corporation; (4) a carrier cannot sell or lease to any other entity any excess capacity or computer system component which the carrier uses in any way for the provision of its common carrier communications services; (5) a carrier may not purchase, lease or otherwise obtain any data processing service or services from its separate corporation; and (6) the carrier cannot permit the separate corporation to employ in its name, any words or symbols contained in the name of the carrier, or use the carrier's name in the separate corporation's promotional enterprise.

This Court reviewed the computer rules in GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973). The

Court affirmed rules 1-4 above as a legitimate effort to insure that regulated carriers continue to provide the public with efficient and economical telephone service. 474 F.2d at 730-32. However, it determined that rules 5 and 6 could not be affirmed since their purpose did not appear related to the Commission's communications concerns, but instead appeared designated to enhance competition in the data processing industry. Id. at 732-36. The Court said:

[The Commission's] concern here therefore is not for the communications market which Congress has entrusted to its care, but for data processing which is beyond its charge and which the Commission itself has announced it declines to regulate. We find the intrusion to be without authority either in the Communications Act or in the cases construing it. 2/

B. Evolution of Remote Access Devices.

As the Commission noted in the Order here under review, communications common carriers have historically provided both voice services (e.g. utilizing telephone instruments) and digital services (e.g. utilizing teletypewriters). Order, para. 3-4 (J.A. 970). Of course, when computers began to come of age, it was quickly recognized

2/ Id. at 733.

that teletypewriters could be efficiently utilized to communicate with computers from remote locations since they operated with digital electrical signals just as did computers.

Teletypewriters have a typewriter-like keyboard from which an operator may type and transmit a message directly to the computer, symbol by symbol. Or, the operator may use the teletypewriter to generate a punched paper tape. In this case, the contents may then be transmitted to the computer as one message via a tape reader and transmitter associated with the teletypewriter. Buffering the data by using the paper tape as a temporary storage medium will usually take up less actual transmission time than the first method, since the tape runs at a speed higher than the operator can type. Using the paper tape has the added advantage of permitting the user to edit and correct the data by backspacing and using the "rubout" key to strike over the erroneous character. The erased or rubbed out character is ignored when the message is received, thus allowing reception of corrected text.

A demand soon developed for remote access to computers, and the carriers responded to it by offering

teletypewriter services which were dependent on customer provided computers.^{3/} Prior to the advent of the computer, terminals of this type were dependent on carrier provided line controllers. In the mid 1950's, for example, AT&T offered its FINAC system under its then FCC tariff 134, which utilized AT&T model 28 teletypewriters in conjunction with private lines. In this configuration the teletypewriters could only communicate with a central location under the control of a carrier-provided line controller (subsequently the terminals were offered for use with a customer-provided controller). In the mid 1960's AT&T offered the 85, 86 and 8B Data Selective Calling Systems which utilized the more advanced model 33, 35, and 37 teletypewriters in order to access customer-provided computers from remote locations utilizing telephone lines. These services were configured such that the teletypewriters could not communicate with each other except under the control of a customer provided computer or similar device.

In 1971 when the Commission was making its decisions in the Computer Inquiry, most of the devices used for remote computer access were still teletypewriters. The teletypewriter

^{3/} In the mid-1950's remote access to computers was done in the "Off-line" mode. Data was transmitted to a storage device--such as a paper tape receiver/punch. The paper tape was then manually introduced to the computer system. A decade later, it was possible to connect computers directly to a communications line--the "on-line" mode.

or remote access device, would input data to a large scale centralized computer which would process the data, and then transmit the processed information to the teletypewriter for display. Soon thereafter, however, rapid advances in technology led to wide market acceptance of improved remote access devices which began to supplant the teletypewriter. More sophisticated devices were developed and marketed not only by the computer-giant, IBM, but also by many new companies (such as now comprise the memberships of CCIA and CBEMA).

In 1974 AT&T filed its DATASPEED 40/3 system tariff with the FCC. ^{4/} The DATASPEED 40/3 was a vast improvement over the teletypewriter capabilities. Instead of the relatively slow teletypewriter printer, the dataspeed 40/3 had a faster printer and a cathode ray tube (CRT) display screen (in appearance, much like a small television screen). Messages typed on the keyboard appeared on the display screen. Utilizing a buffer and the display screen, the operator was able to prepare and correct the message more easily and efficiently than with the old teletypewriter paper tape. It should be

^{4/} Dataspeed 40/1, 2 and 3 systems had earlier been filed with the states, but not with the FCC. Dataspeed 40/1 was tariffed with the Commission at the same time as Dataspeed 40/3.

noted that the 40/3 service utilized an 8A line control which was identical to the 8A utilized by some versions of model 33 and 35 teletypewriters. Just as some previous teletypewriters were dependent on a computer for communication, so the 40/3 was computer dependent and incapable of direct terminal to terminal communication.

Incoterm Corporation objected to the filing of the DATASPEED 40/3 offering on the ground, inter alia, that it constituted a data processing service rather than a communications service. The Common Carrier Bureau responded that further investigation was not warranted and allowed the tariff to go into effect. Letter from the Chief, Common Carrier Bureau to Jean M. Tariot, President, Incoterm Corp., November 20, 1974 (Addendum A-1).

II. The Proceedings Under Review.

On November 18, 1975, AT&T filed revisions to its tariffs Nos. 260 (Private Line Service) and 267 (DATAPHONE Digital Service) to add additional items of Dataspeed 40 data communications terminal equipment to its existing Dataspeed 40 services. Since this was the fourth in a series of such data terminal equipment offerings, it was referred to as Dataspeed 40/4.

The Dataspeed 40/4 equipment made three basic improvements to the service already available. First, it allows the user to group or "cluster" the Dataspeed 40/4

terminals so that several of them can be connected to one telephone line. Second, where previous dataspeed equipment had only asynchronous transmission capabilities, the new equipment allows customers to select synchronous transmission, thus obtaining higher transmission speed. ^{5/} And third, it improved other capabilities already present such as error checking prior to transmissions ^{6/} and more versatile display.

Pursuant to the requirements of Section 61.38 of the Commission's rules, 47 C.F.R. 61.38 (Addendum A-2), the tariff filing was accompanied by over 140 pages of explanatory material and data to justify the new offering. This material described the equipment and its operation in detail, contained a 3 year projection of costs and 3 year estimates of its effect upon traffic and revenue, and provided working papers and other explanation establishing the basis for determining rates.

5/ In the synchronous digital mode, individual characters are grouped together in multicharacter strings and sent at one invariant rate. With asynchronous transmission the time duration between successive characters may vary by the time lapse between each stroke of a typewriter key.

6/ The dataspeed 40/4 utilizes a BSC link control as the ground rules for the exchange of messages. This control procedure is the same in function as, for example, the 85 and 86 Teletypewriter systems, and is used frequently in environments where synchronous transmission is used and better error checking required.

Petitions to reject or suspend the Dataspeed 40/4 tariff were filed by the three petitioners in this Court: IBM, the country's largest manufacturer of computer equipment, and the two trade organizations representing computer manufacturers, the Computer and Business Equipment Manufacturers Association (CBEMA) and the Computer Industries Association (now the Computer & Communication Industry Association, CCIA). Petitioners argued that the tariff should not be permitted to become effective because it was allegedly a data processing service, not a communications service, and as such could not be offered by AT&T without violating the Commission's maximum separation policy established in the 1971 Computer Inquiry. In addition, CBEMA contended that the filing had to be rejected because it allegedly did not contain sufficient economic work papers or other data to satisfy the requirements of Section 61.38 of the Commission's rules.

A. The Bureau Chief's Order.

The Dataspeed 40/4 tariff was first reviewed by the Chief of the Commission's Common Carrier Bureau, who has been delegated the authority, subject to Commission review, to reject any tariff which appears unlawful on its face. 47 C.F.R. 0.291. The Bureau chief recognized that the "immediate issue" before the Commission in the 1971 Computer Inquiry had been the "various applications which might be made of

central computers," and that the Dataspeed 40/4 offering was not formally covered by the rules since it did not involve the offering of central computer capabilities.^{7/} Nevertheless he decided that the Dataspeed 40/4 was so "inextricably intertwined" with the data processing provided by the customer's computer that the Computer Inquiry policies should govern his decision.^{8/}

Looking at the Dataspeed 40/4 equipment, the Bureau Chief determined that it was different from teletypewriter equipment, because the teletypewriter, although frequently utilized for computer input and output, was "primarily designed and marketed for terminal-to-terminal message exchange," while the Dataspeed 40/4 equipment was designed and marketed "solely for the input, output, formatting, and conversion of computer based data." Bureau Chief Order, para. 14 (J.A. 648). Moreover, he concluded that since the Dataspeed 40/4 was intended only for use with a central computer instead of traditional terminal-to-terminal message transmission, the offering was inherently a data processing service. As such, he found that it violated the "maximum separation"

^{7/} American Telephone and Telegraph Company, FCC paras. 12, 18 (1976) (Hereinafter "Bureau Chief Order" (J.A. 647, 649)).

^{8/} Id. at paras. 16, 18 (J.A. 649).

policy of the Commission's Computer rules because "the costs associated with its design, development and manufacture [were] not clearly separable from monopoly and other regulated common carrier activities." Id. at paras. 19-20 (J.A. 650).^{9/}

B. The Commission Order.

On April 2, 1976 AT&T filed with the Commission an Application for Review of the Bureau Chief's action. GTE Service Corporation, the United States Independent Telephone Association, and the Ad Hoc Telecommunications Committee (representing major users of communications facilities for both voice and data communications) filed comments supporting AT&T's application. IBM and CBEMA opposed the application, and CBEMA filed a contingent application for limited review, arguing that even if the Bureau Chief were reversed the tariff filing should still be rejected for failure to satisfy the requirements of Section 61.38.

^{9/} As to CBEMA's arguments concerning the adequacy of the data submitted to satisfy the requirements of Section 61.38 of the Commission's rules, the Bureau Chief found that the materials submitted was adequate under the rules. Id. at para. 22 (J.A. 650).

After reviewing all of the arguments before it, the Commission reversed the Bureau Chief's decision and permitted AT&T to refile the Dataspeed 40/4 tariff revisions. The Commission emphasized that its Computer Rules had been intended to apply only to "the provision and utilization of central host computers by communications common carriers."

American Telephone and Telegraph, FCC 76-119, para. 25

(J.A. 979) (hereafter, "Commission Order"). Since the Dataspeed 40/4 offering did not purport to offer the data processing capabilities of AT&T's central computers, the Computer Rules were just not applicable. The Commission recognized that remote access devices had become more sophisticated since the Computer Inquiry. But it found this fact to be no justification for extending, as the Bureau Chief had done, the existing Computer Rules to prohibit the offering of services which did not come within the terms of the rules because they did not involve the offering of a computer by a common carrier.

After having found that its Computer Rules were not applicable in this case, the Commission turned to the question of whether or not the service constituted a communications service. This was important since, even if not subject to the Commission's maximum separation rules because there was no offering by AT&T of central computer capability, the service could not be tarified if it was not a communications service. This question, the Commission found, had to be answered on the basis of the nature of the service offered (i.e., the remote access device plus transmission lines), rather than on the service as tied to a computer as the Bureau Chief had analyzed it.

With the advances in data processing technology which had occurred since the 1971 computer inquiry, the Commission found that the clear delineation which existed between remote access devices and computers was being gradually erased. Now various processing functions of the host computer were distributed among peripheral devices. The Dataspeed 40/4 was an example of this evolution. The Commission found that the service did incorporate "minimal data processing functions," but they were designed "to facilitate the efficient transmission of data over the communications link." Id. at para. 30 (J.A. 981). As such the service

was "similar in kind" to that provided by established communication devices and constituted a legitimate "communications service" which could be tarified under the Communications Act. Ibid.

Six months prior to this decision the Commission had initiated a second computer inquiry in order to redefine the role of a computer in the provision of a data processing or communications service.^{10/} It now recognized that it needed to expand that proceeding to examine the problems raised by peripheral devices performing data processing functions in conjunction with a computer. For example, it recognized that the Dataspeed 40/4 comes close to the line dividing communications from data processing, and incorporation of additional features might push such a service over that line. Accordingly, it resolved to expand the new computer inquiry to examine such questions. Its determination in the Dataspeed 40/4 matter was expressly made subject to any determinations which might be reached in that proceeding. Commission Order, para. 32-33 (J.A. 982).

10/ Notice of Inquiry and Proposed Rulemaking in Docket 20828, 61 FCC 2d 103 (1976).

Addressing CBEMA's 61.38 arguments, the Commission held that "AT&T has substantially complied with the requirements of Section 61.38 and has clearly complied with the specific components thereof in terms of the economic data submitted, justification for the filing, and the basis for the rates selected." Id. at para. 36 (J.A. 983). As to CBEMA's claims that AT&T had to affirmatively demonstrate that the developmental and other costs of Dataspeed 40/4 are not subsidized by other regulated communications services, the Commission observed that such questions are "beyond the scope of Section 61.38." Ibid.

C. Subsequent Proceedings.

CCIA petitioned the Commission to stay the effectiveness of its Dataspeed 40/4 Decision until it had completed its new Computer Inquiry, or in the alternative pending action on the decision by the court of appeals. The Commission reaffirmed its decision and denied CCIA's petition as without merit. American Telephone & Telegraph Co., FCC 77-56, January 25, 1977 (J.A. 989). CCIA pressed its arguments for stay before this Court, and was again turned down on January 24, 1977.

ARGUMENT

- I. THE COMMISSION PROPERLY DETERMINED THAT THE DATASPEED 40/4 SERVICE WAS NOT SUBJECT TO ITS COMPUTER INQUIRY PROHIBITIONS AND WAS A COMMUNICATIONS SERVICE WHICH COULD BE LAWFULLY TARIFFED UNDER THE COMMUNICATIONS ACT.

- A. The Commission Properly Construed Its Own Computer Inquiry Rules As Intended To Restrict Only Offerings Of Data Processing Capabilities Of A Carrier's Central Computer And Not Carrier Offerings Of Terminals Designed To Communicate With Computers.

Petitioners make no effort to quarrel about the status of the law concerning judicial interpretation of administrative regulations as established by the Supreme Court:

the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. 11/

Faced with a square holding by the Commission that its 1971 computer rules were never intended to restrict carrier offerings of remote access devices, petitioners are reduced to arguing that the Court should set aside the Agency's interpretation of its own rules on the theory that "the Commission has misconstrued the regulatory intent underlying its computer rules and has therefore rendered a clearly mistaken and erroneous interpretation of those rules"

11/ Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945); Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

CCIA Brief, p. 13; See also IBM Brief, p. 26. Specifically, they dispute the Commission's holding that the purpose and effect of its computer rules was to prohibit a carrier from utilizing its central computers to provide data processing services, and was not, as urged by petitioners, also to prohibit a carrier from offering terminals designed to communicate with computers.

Even the most searching analysis of the plain language of the rules reveals nothing to negate the Commission's interpretation (the rules, 47 C.F.R. 64.702, are attached as Addendum A-3.) The acting clauses forbid common carriers from providing "data processing" services to others except under delineated conditions designed to maintain maximum separation between regulated common carrier activities and unregulated data processing activities. "Data processing is defined at the very beginning of the rules:

- (a) For the purpose of this subpart--
- (1) "Data processing" is the use of a computer for the processing of information as distinguished from circuit or message-switching. "Processing" involves the use of the computer for operations which include, inter alia, the functions of storing, retrieving, sorting, merging and calculating data, according to programed instructions. 12/

12/ 47 C.F.R. 64.702(a)(1).

It must be remembered that the Commission did not simply accept the definitions utilized at the time by the data processing community, but because its "purpose was uniquely that of government regulation," the Commission pointedly fashioned its own definitions "as free from ambiguity as language permits." Tentative Decision, 28 FCC 2d at 295. Thus, when it defined "data processing" as the "use of a computer for the processing of information," the Commission contemplated nothing more or less than what was specifically included. If the Commission had intended to prohibit anything beyond "use of a computer" (such as the offering of terminals designed to interact with computers), it would have delineated that too as unambiguously as language permits.

The Commission purposefully drafted its definitions so that improper use of carrier computers would be prohibited regardless of whether it involved on-site access or remote (off-site) access obtained by use of communications lines and customer terminals. Tentative Decision, 28 FCC 2d at 302, para. 35. Thus in addition to spelling out the definition of "data processing," the Commission also defined "local data processing service" and "remote access data processing service:"

(3) "Local Data Processing Service" is an offering of data processing wherein communications facilities are not involved in serving the customer.

(4) "Remote Access Data Processing Service" is an offering of data processing wherein communications facilities, linking a central computer to remote customer terminals, provide a vehicle for the transmission of data between such computer and customer terminals. 13/

Petitioners seize upon the definition of "remote access data processing service," and argue that by including this definition the Commission prohibited, not only improper use of carrier computers, but also carrier provision of any customer terminals designed to access a computer. This conclusion is a totally unwarranted and unsupportable contortion of the plain meaning of the rules. The definition itself is not an acting clause; it does not prohibit anything. All it does is describe what constitutes a remote access data processing service. It does not purport to prohibit carrier provision of customer terminals any more than it prohibits carrier offerings of the "communications facilities" also included in the definition.

Review of the Computer Inquiry Orders reveals no mention of any intent to prohibit carrier offerings of remote access devices in conjunction with transmission lines. The absence of any discussion whatsoever about what would have

13/ 47 C.F.R. 64.702(a) (3), (4).

been a radical and extremely significant step detracts greatly from the credibility of petitioners' contentions.

Throughout the Computer Inquiry the Commission's concern unquestionably centered about improper use of the carriers' computers, and not at all about remote access devices. In the Notice of Inquiry it stated its concern was raised --

by the fact that computers utilized for the provision of conventional communication services could be programmed additionally to perform data processing services. 14/

In the Final Decision, the Commission said nothing about prohibiting carrier provision of remote access devices.

Instead it unequivocally stated:

We conclude that a carrier's computer system or systems should be dedicated exclusively to its public communication services or to its "in-house" data processing requirements incidental thereto. 15/

Petitioners appear to forget that in 1971 the remote access device was simply a teletypewriter, linked to a central computer by communications channels. In remote access data processing the computer did the data processing, not the teletypewriter. Tentative Order, para. 39.

The Commission never made any effort to terminate

14/ 7 FCC 2d 11, 13 (1966).

15/ Final Decision, 28 FCC 2d at 271.

carrier offerings of teletypewriters in conjunction with telephone lines, like AT&T's 85, 86 and 8B Data Selective Calling Systems which were utilized for remote computer access. This, in the face of the Commission's stated intent "to maintain a careful and continuous observation of the activities of the Bell System companies in their use and application of computer technology . . . to the end that such companies shall not offer data processing,"^{16/} is additional evidence that the Commission did not view offerings of remote access devices to be prohibited by its rules.

Finally, if petitioners' arguments regarding the scope of the rules is correct, then it would appear that this Court was severely misled as to their effect when it decided GTE Service Corp. v. FCC, supra. Although they contested every aspect of the rules, the telephone company petitioners made no arguments concerning any restrictions on their offerings of remote access devices. We submit that at the time there were no misimpressions about the scope of the rules, and that the Court was not mistaken when, after reviewing the rules and the orders adopting them, it stated the Commission's concern to be about "surplus computer time" and "excess computer capacity." 474 F.2d at 728.

In sum, the Commission's interpretation of its own rules is consistent with their plain language, the

^{16/} Tentative Decision, 28 FCC 2d at 305, para. 43.

orders adopting them, their subsequent enforcement, and this Court's unders tanding on review. With such a heavy preponderance of evidence confirming the correctness of the Commission's interpretation, petitioners' attempts to overturn it must fail.

- B. Having Affirmed That The Computer Inquiry Prohibitions Did Not Encompass Carrier Offerings Of Remote Access Devices In Conjunction With Transmission Lines, The Commission Properly Refused To Extend Preemptively Its Computer Policy To Bar The Dataspeed 40/4 Offering.

The Bureau Chief had recognized, just as the Commission did, that "the immediate issue before the Commission at [the time of the 1971 Computer Inquiry] concerned the various applications which might be made of central computers." Bureau Chief Order, para. 12 (J.A. 647). However, unlike the Commission, the Bureau Chief decided that the rules should be extended to prohibit carrier offerings, not only of central computer capacity, but also of the new terminals which possessed some data processing capabilities and were designed solely for usage with central computers.

The Commission found that the Bureau Chief's answer ^{17/} was an oversimplification of the problem. It emphasized

^{17/} IBM tries to puff up the significance of the Bureau Chief's decision by comparing it to findings of fact made by a hearing examiner after an evidentiary proceeding. IBM Br., 23. Here, the Bureau Chief held no evidentiary hearing, and indeed, there was no dispute concerning the facts which might have necessitated one. As petitioner CCIA notes, "[t]he legal question that petitioner poses does not concern what the Dataspeed 40/4 does or how it functions, for this has been generally agreed on." CCIA Br., p. 26. In such cases there is no requirement for an evidentiary hearing. (footnote continued on next page)

that the "maximum separation policy was directed to the provision and utilization of central host computers by communications common carriers," and that the computer rules would only be applicable if AT&T offered the data processing capabilities of its central computers "as part of the Dataspeed 40/4 service." Commission Order, para. 25 (J.A. 979, emphasis added). Since "AT&T is not providing and does not propose to offer the data processing operations of the central computer," the Commission could not find the computer rules applicable. Ibid.

As the Commission stated at paragraph 31 of its Order. (J.A. 981):

The fact of the matter is that data processing technology has advanced since our Final Decision in 1971 resulting in various data processing functions of the host computer being distributed among peripheral devices.

Having never previously taken the opportunity to analyze these new developments and their impact on the public interest, the Commission obviously could not suddenly expand its rules restricting carrier central computers to encompass offerings of the new terminal equipment. Therefore, it quite properly decided to analyze the propriety of the Dataspeed 40/4

17/ (footnote continued from previous page)
"[I]f the question is not of facts but of 'inferences to be drawn from facts already known and the legal conclusions to be derived from these facts;' no hearing is required." Columbus Broadcasting Coalition v. FCC, 164 U.S. App. D.C. 213, 217, 505 F.2d 320, 324 (1974) (footnote omitted).

offering then before it, and consider what if any public interest problems were raised in general by carrier offerings of the new "smart" terminals in a separate rulemaking proceeding.^{18/}

Petitioners argue that the Commission erred by not attempting to rationalize its Dataspeed 40/4 decision in terms of the maximum separation rule. As IBM recognizes, IBM Br., p. 5, a primary purpose of the rule was to ensure that the risks and costs of a common carrier's data processing ventures would not as a result of commingling, be borne by its common carriage users.^{19/} Since the Commission specifically found that Dataspeed 40/4 offering to be a communications service, Commission Order, para. 30 (J.A. 981), and not data processing the constraints imposed by the maximum separation policy were not applicable.

^{18/} A second computer inquiry had been designated on August 9, 1976, Notice of Inquiry and Proposed Rulemaking in Docket 20828, 61 FCC 2d 103 (1976). In accordance with the Commission resolution in Dataspeed 40/4, this was expanded by a Supplemental Notice, FCC 77-151 (March 8, 1977), to include issues concerning carrier offerings of smart terminals.

^{19/} Tentative Decision, 28 FCC 2d at 299. Petitioner CCIA emphasizes throughout its argument that an objective of the rule was to "prohibit unfair competition between regulated common carriers and unregulated companies competing in the data processing field." CCIA Br., p. 13. While this was true, the concern has no bearing on this case because the Commission correctly found that AT&T was offering a communication service and not a data processing service. Moreover, CCIA's arguments suffer by forgetting that this Court subsequently ruled improper the Commission concerns about anticompetitive effects upon markets beyond its jurisdiction, and specifically the data processing market. GTE Service Corp., 474 F.2d at 733. To suggest that the Commission should now prohibit AT&T's offering of the Dataspeed 40/4 because it might affect competition in the data processing market is to encourage the Commission to commit the same mistake it did in GTE Service Corp.

IBM's search for some sort of unexpressed rationale, which might have motivated the seven Commissioners to accept the AT&T filing, further highlights the lack of substance behind petitioners' arguments. See IBM Br., pp. 32-34. There is no reason to credit IBM's speculation that the Commission decided to accept the Dataspeed 40/4 filing because it did not want to eliminate a major competitor from the data processing field.^{20/} The Commission's order conscientiously explains that the decision was based upon an evaluation of the service offering, and the intent and plain language of the Computer Inquiry Rules. The decision can and must be judged on the grounds that the agency has given to support it. SEC v. Chenery Corp., 318 U.S. 80 (1943).

^{20/} It is entirely proper for the Commission to make itself aware of all effects and ramifications of its public interest determinations. Thus, it was not irregular for the Commission to seek the opinion of the Justice Department concerning the 1956 Consent Decree (United States v. Western Electric Co. and AT&T, 1956 Trade Cases ¶71,134 (D. N.J. 1956) implications of its Dataspeed 40/4 decision. IBM's version of Chairman Wiley's concurring statement is imaginative, but not accurate. The Chairman made no mention at all of any concern about "eliminat(ing) a major competitor from the remote data processing field." IBM, Br., p. 32-33. His exact words were:

. . . my initial judgment has been tempered by a recognition that the original computer Inquiry did not purport to prescribe rules and definitions for terminals, and by a concern that rigid application by analogy of those rules to terminals might result in denying communications options and alternatives to consumers. This latter concern is particularly significant given the effect of the 1956 Consent Decree on AT&T's ability to offer data terminals

(footnote continued on next page)

C. The Commission Reasonably Determined That The Dataspeed 40/4 Was A Communications Service Within The Meaning Of The Communications Act.

Having determined that the offering of Dataspeed 40/4 service was not restricted by the Computer Rules, the Commission analyzed it to determine whether it was properly a communications service which could be tariffed under the Communications Act.

The Communications Act vests the Commission with broad authority to regulate "interstate and foreign commerce in communications by wire and radio." 47 U.S.C. 151. A common carrier can provide "interstate wire or radio communication" only in accordance with tariffs which have been filed and published in accordance with the provisions of the Act. 47 U.S.C. 203(a) and (c). "Communication by wire" is defined to specifically include "all instrumentalities, facilities, apparatus, and services" incidental to wire

20/ (footnote continued from previous page)
Concurring Statement of Chairman Wiley, p. 1 (J.A. 985).
Clearly, his concern was not the possible loss of data processing competitors, but the possible loss to the public of communications options which could result by analogizing the computer rules to apply to data terminals. There is a big difference between desiring to insure that the public is not artificially deprived of communications alternatives and desiring to inject AT&T into the data processing field.

transmission. 47 U.S.C. 153(a). There is no question that remote access devices when part of a communications service are communications terminal equipment and, as such, are instrumentalities incidental to wire transmission properly subject to FCC jurisdiction. Perhaps the most exhaustive discussion of regulated "terminal equipment" and the extent of the Commission's authority over it is contained in a case just recently decided, North Carolina Utilities Commission v. FCC, No. 76-1002 (4th Cir., March 22, 1977), petition for cert. filed (U.S. May 1977) (No. 76-1675). There, the Court correctly stated:

The phrase "terminal equipment" refers to devices utilized for transmission or reception of communications when attached to the national telecommunication line network. Items of terminal equipment include common residential telephones (both main station and extension phones), key telephones, answering devices, dialers, computer terminals and private branch exchange (PBX's). 21/

21/ Id. slip op. at 1 (emphasis added). The Court affirmed Commission orders adopting a program of terminal equipment registration. See Second Report and Order in Docket 19528, 58 FCC 2d 736 (1976). The program applies to all terminal equipment whether manufactured by telephone companies or independent companies and is designed to protect the network while at the same time enabling users to attach their own registered equipment without, as in the past, having to lease expensive network protective devices from the telephone companies. The registration requirements apply to all communications terminal equipment, including main and extension telephones, PBX and key telephone equipment, ancillary devices, and data terminals, or to protective circuitry thru which unregistered equipment may be connected.

Upon analyzing the characteristics of the Dataspeed 40/4 services the Commission concluded that --

it is similar in kind, but not in degree, to [the service] provided by established communications devices -- devices utilized to transmit input data to a computer and to serve as the terminus for the processed output data transmitted from the computer. 22/

IBM would have preferred the Commission to analyze the Dataspeed 40/4 in conjunction with a computer as an integrated system, rather than solely on the basis of the specific service AT&T was offering. Clearly the Commission's approach was the correct one because AT&T was not purporting to offer the computer, and the Commission is only engaged in regulating the carriers activities. Nor can IBM undermine the reasonableness of the Commission's approach by contrasting it with that proposed in the subsequently issued Supplemental Notice of Inquiry in Docket 20828, supra. The Commission must make its determinations on the basis of existing rules and public interest findings, regardless of the fact that it may be considering a modification to those rules in another

22/ Commission Order, para. 27. (J.A. 980).

proceeding.^{23/} Whether or not the proposals in Docket 20828 will ever be adopted cannot be gauged at this point, and IBM's attempt to impeach the Dataspeed 40/4 decision on the basis of rulemaking proposals, which may or may not be adopted, only further highlights the weakness of its overall position.

23/ American Lines v. Louisville & N.R.R., 392 U.S. 571 (1968); Columbia Broadcasting Co. v. Democratic Committee, 412 U.S. 94 (1973). Moreover, even if the proposed approach were relevant, it is not inconsistent with that followed by the Commission here. The whole purpose of the Notice is to enlarge the scope of Section 64.702 to include not just processing activities performed by the central computer, but also those "performed at the customers premises, or at intermediate locations within or interconnected with a telecommunications network." Supplemental Notice, at para. 8. Instead of focusing on individual functions such as storing or merging, the proposed definition will focus on processing activities -- or "the aggregate end result of a combination of operations, no matter where performed." Id. at p. 10, fn. 19. However, contrary to IBM's conclusions, the "activities" focused on will still be just those "incorporated into a carrier's communications offering," Id., at p. 7, and will not include those provided by customer-supplied equipment. Finally, IBM's suggestion, at Br. p. 39, that the definitions of "data processing" proposed in the Supplemental Notice demonstrate that the Commission erred in its classification of Dataspeed 40/4, is wrong. The Supplemental Notice at p. 7, also defines "processing activities which would not constitute data processing" such as "formatting, editing, and buffering of information to make it compatible with the electrical characteristics of different transmission media." Assuming the definition the Commission ultimately adopts raises questions about any AT&T offering, the Commission, and not IBM, will be the one to decide the matter. See Commission Order, para. 33 (J.A. 982).

The Commission was well aware that the Dataspeed 40/4 equipment was designed solely to communicate with a computer, but this fact alone does not detract from its basic communications functions. For years AT&T has offered services providing remote access to computers utilizing carrier provided terminal equipment and telephone lines. The 85, 86 and 8B Data Selective Calling Systems were all systems using teletypewriters to communicate with computers or other business machines, and like the Dataspeed 40/4, teletypewriters set up in this manner could not communicate with other teletypewriters except under the control of a computer. The Dataspeed 40/3 was the most recent example of a communications terminal designed solely to communicate with computers, and when that filing was opposed on the basis of the same arguments made here, the Common Carrier Bureau found no merit to the argument that the 40/3 was really a data processing and not a communications service. Letter from the Chief, Common Carrier Bureau to Jean M. Tariot, President, Incoterm Corp., November 20, 1974 (Addendum A-1).

The Dataspeed 40/4 did not add additional data processing capabilities to the 40/3; it merely upgraded the service by incorporating additional communications features. Perhaps the principal advancement of the 40/4 was the "clustering" capability, the ability to connect several

terminals to one telephone line instead of requiring an individual telephone line for each terminal. Of course, clustering is historically a communications capability, which results in a more efficient use of a communications network. Common telephone company PBX equipment cluster numerous telephone sets which can utilize the same telephone line, and teletypewriters have been clustered around a single line in order to make optimum use of the line by preparing the material at several machines and holding transmission until the line was clear. As far back as the early 1950's line control devices were utilized to poll clustered teletypewriters for messages and transmit them when the line was clear. They also intercepted incoming messages directed to busy stations and held them to be transmitted when the station became free. See AT&T Application for Review, April 2, 1976, Attach. B, p. 3 (J.A. 685).

A second improvement in the Dataspeed 40/4 afforded the user the ability to utilize faster transmission by transmitting in the synchronous rather than the asynchronous mode. There can be no question that the method of transmission, whether asynchronous or synchronous, is a communications feature and not a data processing feature.

Lastly, the Dataspeed 40/4 incorporates other changes in the performance of the Dataspeed 40/3, such as improved error checking capability. These modifications did not add any separate functions to the 40/3, but merely modified operation of the capabilities already there.

Those Dataspeed 40/4 functions which might be considered most analogous to traditional data processing functions are the storage, buffering, and editing capabilities. Commission Order, paras. 28, 29 (J.A. 980). But these same capabilities were present in the 40/3 which the Commission permitted to be tariffed in 1974 over almost identical objections as those now raised. Moreover, the Commission found these capabilities to be not unlike the capabilities of the old teletypewriters, and they were intended to "permit efficient utilization of the private line communications channel over which the data is transmitted." Id. at para. 28 (J.A. 980).

The text editing function, for example, was accomplished on the teletypewriter by making corrections on the teletypewriter punched paper tape before transmission. With the Dataspeed 40/4 the information may be viewed on the CRT and edited as desired by utilizing an operator controlled cursor to pinpoint the spot to be corrected and the keyboard to type in the changes. "It can then be transmitted to the host computer in one burst -- free of operator errors." Commission Order, para. 10 (J.A. 973).

The storage and buffering capabilities allow data to be collected and retained at the transmitter until all the input data are entered. A teletypewriter operator accomplished this function by typing his entire message on punched paper tape which would not be transmitted until the message was completed.

The Commission's conclusion that the Dataspeed 40/4 offering is a communications service is consistent not only with the Common Carrier Bureau's 1974 response to the identical arguments raised against the 40/3, but it is also consistent with recent rulings of state public utility commissions which have also tariffed the 40/4. For example, the State of New York Public Service Commission permitted Dataspeed 40/4 to be offered in New York upon the recommendation of its Communications Division. Based on informal inquiries from IBM, the Communications Division alerted the Commissioners to the possibility of complaints that the Dataspeed 40/4 was a data processing rather than a telephone service. The Division stated its opinion based upon the extensive record before it:

we are of the opinion that Dataspeed 40 is functionally similar to existing teletype services and as such constitutes basic telephone service. 24/

After fully analyzing the characteristics of the Dataspeed 40/4 service the Commission found it to represent "a combination of both communications and data processing." Commission Order, para. 30 (J.A. 981). However, the fact that the service did incorporate some data processing

24/ Item No. 502, From Communications Division To State Of New York Public Service Commission, November 5, 1975, p. 6 (Addendum A-4, p. 6). Thus, it is interesting to note that if the IBM arguments had been accepted, New York subscribers, and those in the other states where the Dataspeed 40/4 tariff is in effect, could use their Dataspeed services for intrastate communication, but not for interstate communication.

characteristics did not mean that the service was no longer a communications service. Finding that the data processing functions were "minimal" and were incorporated "in order to facilitate the efficient transmission of data over the communications link," the Commission held that the Dataspeed 40/4 was a communications service within the meaning of the Communications Act. Ibid.

The Commission cautioned that it considered the Dataspeed 40/4 offering as "one which approaches the borderline between communications and data processing." Id. at para. 33 (J.A. 982). Stating that "a further variation in the functions performed by the Dataspeed 40/4 might alter the nature of the service being offered,"^{25/} the Commission required AT&T to keep it informed of any changes to the offering to ensure that the offering continued to be a communications service.^{26/}

25/ Ibid.

26/ Id. at para. 34 (J.A. 982). IBM argues that, since the Dataspeed 40/4 is comparable to equipment IBM manufactures for computer input/output, the Dataspeed 40/4 must be considered to be a dataprocessing service. This ignores the fact that the Dataspeed 40/4 equipment is only utilized in conjunction with interstate communications lines. If IBM were a common carrier and attempted to offer its comparable equipment in the same fashion, the resultant offering would also be a communications service which would have to be tarified. Moreover, there is nothing at all improper about common carriers offering under tariff items of communications equipment which may also be available on the market from unregulated suppliers. For example, telephone companies may purchase telephone receivers from independent suppliers who market the identical devices to the public. When the carriers make those receivers available to their subscribers, it must be under the provisions of a lawful tariff.

- II. THE COMMISSION PROPERLY DECLINED TO SUSPEND OR INVESTIGATE THE DATASPEED 40/4 FILING, HAVING DETERMINED THAT DATASPEED 40/4 WAS A COMMUNICATIONS SERVICE PROPERLY TARIFFABLE UNDER THE COMMUNICATIONS ACT AND THAT THE ACCOMPANYING SUPPORTING MATERIAL SATISFIED THE REQUIREMENTS OF COMMISSION RULES.
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As this Court has previously noted Congress set forth in Sections 203-05 of the Communications Act a "specific scheme" for the handling of carrier initiated rate revisions. American Telephone and Telegraph Co. v. FCC, 487 F.2d 864, 880 (2d Cir. 1973) (hereafter, "AT&T"). Carriers may modify an existing tariff by filing a new tariff with the Commission. 47 U.S.C. 203. The new tariff may become effective upon the expiration of a notice period.^{26/} The Commission may suspend the effectiveness of any tariff modification for up to five months in order to conduct a hearing to investigate its lawfulness. 47 U.S.C. 204. After this five month period, the tariff becomes effective by operation of law pending the outcome of the hearing. However, where the tariff modification constitutes a rate increase, the carrier may be required to keep account of increases collected so that refunds may be made if the new rates are found to

^{26/} The notice period may be modified or waived by the Commission. AT&T, 487 F.2d at 871, fn. 10.

be unjustified.^{27/} In addition, after a full investigation and hearing, the Commission has the authority to determine the lawfulness of either newly filed or previously established tariffs and in certain instances to prescribe appropriate revisions. 47 U.S.C. 205.

In 1970 the Commission added Section 61.38 to its rules requiring carriers to provide the following information and data (including working papers containing information underlying the data supplied) with each tariff change:

- (1) An explanation of the changed or new matter, the reasons for the filing, and the basis of ratemaking employed;
- and (2) economic data and information to support the changed or new matter including:
 - (i) For changed matter, a cost of service study for all elements of costs for the most recent 12-month period; and for changed and new matter a study containing a projection of costs for a 3-year period beginning at the date of the filing of the tariff matter; and
 - (ii) Estimates of the effects of the changed or new matter upon the carrier's traffic and revenues from the service to which the changed or new matter applies; upon the traffic and revenues from the other service classifications of the carrier; and upon the overall traffic and revenues of the carrier. Estimates should include

^{27/} Ibid. "This refund remedy is in addition to the rights retained by parties injured by allegedly unlawful rates to institute proceedings, either in court or before the Commission, to collect damages from the carrier. Sections 206-08" AT&T, 487 F.2d at 871, fn. 12.

the estimated effects on the traffic and revenue data for the most recent 12-month period and projections for a 3-year period beginning at the date of the filing of the changed or new matter. Complete explanations of the bases for the estimates should be provided. ^{28/}

The rule also requires the carriers to provide four complete sets of working papers.

The Commission expressly stated that the new rules were designed to "facilitate the Commission's judgment as to whether such proposed tariffs present questions of lawfulness which warrant our investigation and hearing."^{29/} Thus, the Commission has never construed the filing of a tariff as a determination of its lawfulness, and neither have the courts.^{30/} If the fact that the Commission declined to reject a filing constituted a determination as to lawfulness, there would be no need to have sections 204 and 208 which provide avenues for investigation of filed tariffs. Rules such as 61.38 are "mere aids to the exercise of the agency's independent discretion,"

^{28/} 47 C.F.R. 61.38(a). The order adopting Section 61.38 is Amendment of Part 61 of the Commission's Rules, 25 FCC 2d 957 (1970), reconsideration denied, 40 FCC 2d 149 (1973).

^{29/} 40 FCC 2d at 153.

^{30/} See, e.g., Brentwood Co., 37 FCC 2d 498 (1972); AT&T, 46 FCC 2d 13 (1974); Associated Press v. FCC, 448 F.2d 1095 (D.C. Cir. 1971).

American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 539 (1970), "promulgated for the purpose of providing the necessary information for the Commission to reach an informed decision on applications." Associated Press, 448 F.2d at 1104 (citing, 397 U.S. at 538). The purpose of the rules is simply to:

provide the Commission with the information necessary to decide whether an investigation and suspension of proposed rates should be ordered; and this information may be sufficient even though it does not amount to a prima facie case. ^{31/}

CBEMA, however, has from the beginning of this proceeding attempted to expand the original purpose of the rules to require submission of "enough information to test cost and market estimates, not simply review them"^{32/} so that the Commission can "determine, in advance of their becoming effective, the lawfulness of proposed tariff changes."^{32/} Thus CBEMA argued to the Commission, as it does here, that AT&T should have been required to submit breakdowns

^{31/} Associated Press, 448 F.2d at 1104.

^{32/} CBEMA Br., p. 25 (emphasis in original).

^{33/} CBEMA Br., p. 17.

of the Dataspeed 40/4 developmental, manufacturing, service and promotional costs, and mathematically show that they were not subsidized by any other regulated and monopoly communications services. The Commission declined to so expand its usual 61.38 requirements, and stated that CBEMA's arguments "address[ed] problems which are beyond the scope of Section 61.38." Commission Order, para. 36 (J.A. 983). That this conclusion was correct is confirmed by the Commission's statements of intent expressed when it reviewed the rule in 1973:

As to the contention that the data required by the Commission's rules should be limited to data that would be reasonably needed by the Commission to understand and to evaluate tariff filings we believe our rules do just that and nothing more. 34/

CBEMA attempts to demonstrate that the Commission has in the past rejected tariffs on the basis of 61.38 arguments such those made here, CBEMA Br. p. 25-29. While Section 61.69(c) of the rules, 47 C.F.R. 61.69(c) states that failure to comply with the rules constitutes "grounds" for rejection, the Commission has made it clear that Section 61.69(c) does not "mandate" rejection of all tariffs not in compliance.

34/ 40 FCC 2d at 154.

Amendment of Part 61 of the Commission's Rules, 40 FCC 2d at 151. In fact, the Commission noted that in the first 2 1/2 years after 61.38 had become effective there had been "but few rejections" based on failure to comply with the rules, and it stated its intention to exercise "reasonable judgment" in implementing the rejection provisions.^{35/}

The fact is that the Commission has never summarily rejected a tariff on the basis of arguments such as those here lodged by CBEMA. The instances where the Bureau has rejected tariffs for failure to comply with Section 61.38 are substantially similar to the example CBEMA attached to its brief--cases where the carrier has totally failed to provide one or more of the listed materials.^{36/} The other cases cited by CBEMA involving Commission rejection of tariffs involve resolution of rate level questions within the context of a Section 204 investigation after acceptance of the tariffs.^{37/}

^{35/} Ibid. The Commission stated that it did not expect retention of Section 61.69(c) "to invite incessant petitions for rejections by the public or protracted Court tests of every significant filing not rejected." Ibid.

^{36/} Letter from Walter R. Hinchman, Chief, Common Carrier Bureau, FCC, to John O'Boyle, Manager, Rates and Tariffs, ITT World Communications, Inc., May 30, 1975. CBEMA Br. at A-14. There, the basis of rejection was, inter alia, that ITT had neglected to provide the explanations required by 61.38(a)(ii), the work papers required by 61.38(b), and the indication of the effect of the rates on revenues required by 61.38(a)(ii).

^{37/} AT&T-Hi-Lo, 55 FCC 2d 224 (1975); 58 FCC 2d 362 (1976); AT&T-WATS, 59 FCC 2d 671 (1976).

CBEMA's assertion that "there are no reported cases where serious questions regarding the quality of Section 61.38 material has been simply dismissed without some remedial action," CBEMA Br., 29, is demonstrably untrue. There are many examples where people have lodged "serious questions" about the sufficiency of Section 61.38 filings, which were thereafter dismissed without some remedial action.^{38/} Perhaps the situation most pertinent to this case, was the Dataspeed 40/3 filing. Responding to claims virtually identical to those made by CBEMA, the Common Carrier Bureau dismissed them without any remedial action. However, the Bureau informed petitioner:

[I]f you wish to pursue this matter further, you are entitled to file a formal complaint with the Commission. Such formal complaint must be filed

^{38/} See, e.g., Brentwood Co., 37 FCC 2d 498 (1972), where the Commission emphasized that denial of petitioner's request was not the equivalent of a finding of lawfulness, and that petitioner was free "to pursue its claim of unlawfulness, by filing a complaint if it wishes to do so." Id. at 499; AT&T, 46 FCC 2d 13 (1974), where the Commission stated that 61.38 simply requires the submission of certain data upon which the carrier relies, and is "not violated here merely because AT&T may have presented no defensible ratemaking basis for the rate changes and may not be able to justify the changes at any further hearing or investigation. Id. at 145; MCI Telecommunications Corp., 53 FCC 2d 572 (1975), where as with Dataspeed 40/4, most of petitioner's points related to the "tariff provisions already in effect, which were not changed in the revision." Id. at 574.

in accordance with Sections 1.721 through 1.735 of the Commission's Rules, copies of which are enclosed.^{39/}

This procedure has been utilized by the Commission for years and it is entirely appropriate in cases such as this. If it wishes to pursue its contentions, CBEMA may file a complaint with the Commission under Section 208 of the Act, 47 U.S.C. 208. If there appears to be any "reasonable ground" for investigating that complaint the Commission is bound to "investigate the matters complained of in such manner and by such means as it shall deem proper." Ibid. Just because CBEMA's suspicions were beyond the scope of Section 61.38, does not mean that they cannot be fleshed out in an appropriate proceeding under section 205 or 208.^{40/}

^{39/} Letter from the Chief, Common Carrier Bureau to Jean M. Tariot, President, Incoterm Corp., November 20, 1974 (Addendum A-1). To date no formal complaint on this matter has been received. The Dataspeed 40/3 case is all the more instructive because the 61.38 data submitted there was typical of that filed in other such situations, and was of substantially the same character as that filed with Dataspeed 40/4.

^{40/} Moreover, questions of cross-subsidy are comparable to questions concerning whether a rate is "too high," and as such are "matter[s] for the Commission to decide after investigation and hearing." Associated Press, 448 F.2d at 1104.

The Commission specifically found that AT&T has "substantially complied with the requirements of Section 61.38 and has clearly complied with the specific components thereof in terms of the economic data submitted, justification for the filing, and the basis for the rates selected." Commission Order, para. 36 (J.A. 983). There is no question that AT&T filed all of the material listed in the rules. As noted above, at p. 12, AT&T filed over 140 pages of explanatory material and data to justify the new offering, including detailed descriptions of the equipment and its operation, 61.38(a), three year projections of costs, 61.38(a)(i), three year estimates of effect upon traffic and revenue, 61.38(a)(ii), and detailed working papers and explanation establishing the ^{41/} basis for determining rates, 61.38(b).

41/ CBEMA's suggestion that the 61.38 data did not meet the requirements of the rules in "three critical respects," CBEMA Br., p. 29-30, is misleading and untrue. (A) While it is true that AT&T did not break down the preservice costs (i.e., developmental, manufacturing, service and promotional costs), for the Dataspeed 40/4, such an undertaking is not a requirement of the rules, nor has the Commission ever required such a breakdown at this stage. It generally accepts the delivered cost of equipment to the carrier. See, e.g., the cost study-unit Installed Cost on Station Cluster Controller-USOC 4TT, which lists the major material costs for the subject equipment from Western Electric Corp. as \$3427.95 (J.A. 290). (B) Similarly, AT&T's cost methods were revealed, contrary to CBEMA's assertion. See for example the Unit Annual Cost sheet submitted for the station cluster controller-USOC 4TT (J.A. 289), where "total incremental investment," "Net Incremental Investment," "Annual Incremental Costs," etc. were listed. (C) The marketing estimates submitted were supported to the degree accepted for all submissions of this type, including for example Dataspeed 40/3.

CBEMA professes difficulty in understanding first, how the Bureau Chief could find the 61.38 data sufficient while at the same time stating that the preservice costs were not clearly separable from monopoly services, and second, why the Commission did not attempt to resolve CBEMA's cross-subsidy allegations. The answer is clear and simple to everyone but CBEMA--as the Commission stated, CBEMA's concerns "address problems which are beyond the scope of Section 61.38." Commission Order, para. 36 (J.A. 983). While the Bureau Chief was concerned about a violation of the Commission's computer policy by a commingling of regulated and unregulated revenues, he still recognized that the 61.38 filing complied with the Commission's rules since 61.38 was never meant to inquire into such problems. Thus he rejected the tariff because it did not demonstrate compliance with the maximum separation policy, but he could not reject it for failure to comply with 61.38. The Commission came to the same conclusion regarding the adequacy of the 61.38 materials. Now if CBEMA wishes to pursue its cross-subsidy and other claims it will have to do so via a complaint.

The Commission's choice not to suspend and investigate the Dataspeed 40/4 filing and leave petitioners to their section 208 complaint remedies is a decision which lies within its proper discretion. The situation here is the same as before the Interstate Commerce Commission in that "if a protestant of a rate is dissatisfied with [ICC] action with regard to suspension, recourse to the Commission by formal complaint under 49 U.S.C. §§13 and 15(1) is the proper

procedure."^{42/} Refusals to suspend tariffs have been held generally not reviewable.^{43/}

Having decided the issues presented to it, regarding the sufficiency of the 61.38 data and whether Dataspeed 40/4 was a properly tariffable communications service, the Commission properly declined to suspend and investigate the tariff filing. As a result of the Bureau Chief's rejection order, the tariff had already been deferred several months beyond the five months the Commission was authorized to suspend.^{44/} In light of the thorough consideration this matter had already received, and the fact that the whole subject of remote access terminals was to be studied in depth in Docket 20828, the decision not to suspend and investigate was a reasonable one.^{45/}

^{42/} Oscar Mayer & Co. v. United States, 268 F. Supp. 977, 980-81 (1967). Sections 13 and 15(1) of the Interstate Commerce Act are the counterparts to Sections 208 and 205 of the Communications Act.

^{43/} See AT&T v. FCC, *supra*, 487 F.2d at 873-74; Arrow Transportation Company v. Southern Railway, 372 U.S. 658, 670 (1973). United States v. Scrap., 412 U.S. 669 (1973).

^{44/} See AT&T v. FCC, 487 F.2d at 881, where the court ordered the Commission to put a tariff into effect immediately where the Commission had already delayed the filing and effectiveness of a tariff longer than the maximum notice and suspension periods provided by the Act.

^{45/} IBM and CCIA suggest that additional investigation was necessary in light of the difficulty of the questions before the Commission. Neither party appears to dispute the Commission's understanding of the facts; they only disagree with the Commission's conclusions derived from the facts. It is well understood in such situations that there is no requirement for a hearing. See fn. 17, above.

CONCLUSION

For all the foregoing reasons, the Commission's order should be affirmed.

Respectfully submitted,

John H. Shenefield,
Acting Assistant Attorney
General,

Werner K. Hartenberger,
General Counsel,

Barry M. Grossman,
Peter L. Delacruz,
Attorneys.

Daniel M. Armstrong,
Associate General Counsel,

Jack David Smith,
Counsel.

Department of Justice
Washington, D.C. 20530
739-2413

Federal Communications Commission
Washington, D.C. 20554
632-7112

May 9, 1977.

ADDENDUM

A-1

RETURN TO ROOM 522

November 20, 1974

9520

Jean H. Tariot, President
Incotera Corporation
6 Strathmore Road
Natick, Massachusetts 01760

Dear Mr. Tariot:

This is in reference to our previous correspondence concerning American Telephone and Telegraph Company's (AT&T) Dataspeed 40 service. We have received a reply from AT&T in response to the inquiry which was made on your behalf. A copy of AT&T's October 25, 1974 letter is enclosed.

AT&T states that Dataspeed 40 does not constitute data processing as defined in the Commission's Rules because it is only in a customer-provided computer that data processing functions such as sorting, merging or calculating of data take place. Further, AT&T states that the Dataspeed 40 service is not being subsidized by the revenues obtained from other common carrier services provided by AT&T because, as shown in the economic data filed pursuant to Section 61.38 of the Commission's Rules, Dataspeed 40 furnishes a contribution to the overall revenue requirement, thereby benefitting the users of other Bell services. AT&T also states that the cost data submitted with the Dataspeed 40 tariff filing clearly indicates relevant and appropriate maintenance costs. Finally, AT&T states that the rates for the Dataspeed 40 Keyboard Display Unit are very close to IBM lease charges for a similar type of unit, depending upon the station arrangement selected.

Upon careful consideration of the correspondence relating to this matter and AT&T's economic data submitted pursuant to Section 61.38 of the Commission's Rules, it is the opinion of the staff that further investigation into the complained of matter does not appear to be warranted on the

Jean M. Tardot, President
Incoterm Corporation

2

basis of the material before us at the present time. However, if you wish to pursue this matter further, you are entitled to file a formal complaint with the Commission. Such formal complaint must be filed in accordance with Sections 1.721 through 1.735 of the Commission's Rules, copies of which are enclosed. Our comments herein are unrelated to the Commission's pending investigation in Docket No. 19129, Phase II.

Sincerely yours,

Ruth V. Roel
Acting Chief, Tariffs
and Services Division
for Chief, Common Carrier Bureau

cc: Thomas W. Scandlyn, Assistant Vice President
American Telephone and Telegraph Company

DJHerrold:cdb/tsd:CC

MAIL ROOM

NOV 1 1974

SIGNED BY ABOVE
MAILED BY

FEDERAL COMMUNICATIONS COMMISSION

RULES AND REGULATIONS

§ 61.33 Material to be submitted with letters of transmittal by filing carriers.

(a) *Explanation and data supporting changes and/or new tariff offering.* The material to be submitted for a tariff change or for a tariff filing which is for a service not previously offered, shall include: (1) An explanation of the changed or new matter, the reasons for the filing, and the basis of ratemaking employed; and (2) economic data and information to support the changed or new matter including:

(i) For changed matter, a cost of service study for all elements of costs for the most recent 12-month period; and for changed and new matter a study containing a projection of costs for a 3-year period beginning at the date of the filing of the tariff matter; and

(ii) Estimates of the effects of the changed or new matter upon the carrier's traffic and revenues from the service to which the changed or new matter applies; upon the traffic and revenues from the other service classifications of the carrier; and upon the overall traffic and revenues of the carrier. Estimates should include the estimated effects on the traffic and revenue data for the most recent 12-month period and projections for a 3-year period beginning at the date of the filing of the changed or new matter. Complete explanations of the bases for the estimates should be provided.

(b) *Working papers and statistical data.* (1) There is to be furnished to the Chief, Common Carrier Bureau, upon filing of any tariff change or tariff filing which is for a service not previously offered, two sets of working papers for use by the staff and two sets of working papers which shall be available for use by the public at the Commission's offices. These working papers shall contain the information underlying the data supplied in response to paragraph (a) of this section. A clear indication shall be made as to how the working papers relate to information supplied in response to paragraph (a) of this section.

(2) All statistical studies will be submitted and supported in the form prescribed in § 1.363 of this chapter.

(c) *Submission of explanation and data by connecting carriers.* If the changed or new matter is being filed by the issuing carrier at the request of a connecting carrier, it will be the duty of the connecting carrier to provide the data and information in paragraphs (a) and (b) of this section on the date the tariff matter is filed with the Commission by the issuing carrier.

(d) *Form and content of material submitted with certain rate increases.* (1) For each rate increase in any service or tariffed item resulting in (i) a 10 percent or greater increase in annual revenues from that service or tariffed item, and (ii) at least \$100,000 in additional annual revenues, both calculated on the basis of existing quantities of service; or for two or more rate increases applying to the same service or tariffed item during any 12-consecutive-month period resulting in (a) a 10 percent or greater increase in annual revenues from that service or tariffed item, and (b) at least \$100,000 in additional annual revenues, both calculated on the basis of existing quantities of service, the filing carrier shall submit all cost, marketing and other data on which it relies in justification of the rate increase and in an appropriate form to serve as the carrier's direct case in the event the rate increase is set for hearing initially scheduled to commence on a date within 6 months from the date of filing. If the rate increase is designated for hearing the carrier shall submit any additional information on which it relies in documentary form, within 45 days from the date of designation.

(2) The information and data requirement of subparagraph (1) of this paragraph shall be submitted for a rate increase in any service or tariffed item resulting in more than \$1 million in additional annual revenues, as calculated on the basis of existing quantities of service, without regard to the percentage increase in such revenues.

(3) The requirement imposed here is in addition to any requirement imposed by the other provisions of this section.

(e) *Copies of explanation and data to customer.* Concurrently with the filing of any rate for special construction or special assembly equipment and arrangements which were developed on the basis of estimated cost, the filing carrier shall transmit to the customer a copy of the explanation and data required by paragraphs (a) and (b) of this section.

(f) *Exception.* The requirements of this section shall not apply to any carrier with annual gross revenues of less than \$100,000.

NOTE: 1: Carriers with annual gross revenues of less than \$1 million are exempt from the requirements of this section until January 30, 1971.

NOTE: 2: The requirements of this section will not apply until January 30, 1971, in those situations where a carrier is filing rates to equal lower rates set by a competing carrier.

Section 64.702

64.702 Furnishing of data processing services.

(a) For the purpose of this subpart—

(1) "Data processing" is the use of a computer for the processing of information as distinguished from circuit or message-switching. "Processing" involves the use of the computer for operations which include, *inter alia*, the functions of storing, retrieving, sorting, merging and calculating data, according to programmed instructions.

(2) "Message-switching" is the computer-controlled transmission of messages, between two or more points, via communications facilities, wherein the content of the message remains unaltered.

(3) "Local Data Processing Service" is an offering of data processing wherein communications facilities are not involved in serving the customer.

(4) "Remote Access Data Processing Service" is an offering of data processing wherein communications facilities, linking a central computer to remote customer terminals, provide a vehicle for the transmission of data between such computer and customer terminals.

(5) "Hybrid Service" is an offering of service which combines Remote Access data processing and message-switching to form a single integrated service.

(i) Hybrid Data Processing Service is a hybrid service offering wherein the message-switching capability is incidental to the data processing function or purpose.

(ii) Hybrid Communication Service is a hybrid service offering wherein the data processing capability is incidental to the message-switching function or purpose.

(b) Except as provided herein, no common carrier subject, in whole or in part, to the Communications Act shall engage directly or indirectly in furnishing data processing service to others except as expressly provided in paragraph (c) of this section. This prohibition shall apply to all communications common carriers, including section 2(b) (2) carriers, where any carrier itself has annual operating revenues exceeding \$1 million or any such carrier is directly or indirectly controlled by, or is under common control with, another carrier or carriers, and the combined annual revenues of all such carriers exceed \$1 million.

(c) Except for Companies of the Bell System, common carriers may, subject to other provisions of law, have a controlling or lesser interest in, or be under common control with, a separate corporate entity that furnishes data processing service to others provided the following conditions are met:

(1) Each such separate corporation must maintain its own books of account, have separate officers, utilize separate operating personnel, and utilize computing equipment and facilities separate from those of the carrier for its data processing service offerings.

(2) Each such common carrier shall file with the Commission a complete statement of the terms and conditions of every written or oral contract, agreement or other arrangement entered into between such carrier and any such separate corporation within 30 days after the contract, agreement, or other arrangement is made.

(3) No such common carrier subject to the prohibition of paragraph (b) of this section shall engage in the sale or promotion of data processing services on behalf of any such separate corporation.

(d) No common carrier subject in whole or in part to the Communications Act of 1934, as amended, shall sell, lease, or otherwise make available to any other entity any capacity or computer system component on its computer system or systems which that carrier uses in any way for the provision of its common carrier communications services.

(e) Any common carrier intending to file a tariff respecting a service offering which it considers to be a hybrid communication service shall, at least 90 days prior to the intended effective date of such tariff, submit to the Commission a complete description of the service, along with a statement of its reasons for concluding that the proposed service is a hybrid communication service. Whereupon:

(1) If, at the end of 60 days after such notice is filed with the Commission, the Commission has not advised the carrier of contrary findings respecting its proposed hybrid communication service, the carrier may proceed to file appropriate tariffs in accordance with applicable provisions of the Commission's rules; or

(2) If the carrier is advised within 60 days after the Commission's receipt of notice that the Commission has tentatively concluded that the proposed offering is not a hybrid communication service, the carrier may seek reconsideration of the tentative conclusion, request a hearing on any disputed factual findings or pursue such other remedies as are provided by law.

(f) Before a common carrier may provide its data processing affiliate with communication services and facilities which the latter desires to use for the furnishing of any hybrid data processing service, the carrier shall first submit, directly or through its affiliate, a complete description of the proposed service offering, along with a statement of the reasons for concluding that the service is a hybrid data processing service. The carrier may provide such service unless, within 30 days from the receipt of such notice, the Commission shall have advised the carrier or its affiliate of the Commission's tentative conclusion that the intended service is a communications service. If the carrier and its affiliate disagree therewith, the carrier may seek reconsideration of the tentative conclusion, request a hearing on any disputed factual findings or pursue such other remedies as are provided by law.

(g) No common carrier providing a communication service, hybrid or otherwise, may discontinue such

Section 64.702 (cont.)

tariffed service until authorization to do so is obtained from the Commission. In seeking authorization to discontinue a service, a carrier must:

- (1) Demonstrate that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance. Such demonstration shall include whether and to what extent there is a demand for the communication service, the entity or entities which would continue to provide such service if discontinued by the carrier, and the comments of existing customers on any proposed modification of the service and its offering by a carrier's data processing affiliate;
- (2) Demonstrate the nature and extent of the public demand for any modified service proposed to be rendered as a hybrid data processing service; and
- (3) Submit full information as to the disposition of any of the facilities used in the communication service, including relevant financial arrangements, the accounting to be performed by the carrier with respect to the transaction, and the treatment of any losses sustained in the provision of the communication service.

ADDENDUM

A-4

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Item No. 532

Session Nov. 13 1975

November 5, 1975

City Albany

TO: THE COMMISSION
FROM: COMMUNICATIONS DIVISION
SUBJECT: New York Telephone Company

P.S.C. No. 800 - Telephone
Section 8

1st Revised Page 28D

1st Revised Page 28E

(2nd Revised Page 28E Issued in Case 26775)

Original Page 28F

(1st Revised Page 28F Issued in Case 26775)

Section 11

1st Revised Page 17

1st Revised Pages 18 & 20

(2nd Revised Pages 18 & 20 Issued in Case 26775)

Original Pages 21-25

ISSUED: October 15, 1975 EFFECTIVE: November 15, 1975

TERRITORY: The entire operating territory of the company in
New York State.

NATURE OF REVISIONS: To redesignate existing DATASPEED 40 terminal
equipment Services Asynchronous, add optional
features to it, and introduce new Synchronous
DATASPEED 40 Services.

RECOMMENDED THAT: The above-named tariff revisions be permitted
to become effective on November 15, 1975 as
issued. Newspaper publication is required.

REVENUE EFFECT: The company has estimated first year sales will
provide approximately \$125,000 in non-recurring
revenues, and annualized recurring revenues of
approximately \$1,400,000.

COMPLAINTS RECEIVED: None.

Background

On June 1, 1974, New York Telephone Company introduced
new DATASPEED* 40 Services using new electronic keyboards with
visual display (KD or Keyboard Display) and printers for entering,

*Registered trademark of AT&T.

storing, displaying, editing and printing data and sending and receiving it in a private line selective calling system over Data Schedule 4 leased channels using 200 Series Data sets (May 24, 1974 Session, Item 511). Each configuration of Keyboard Display and/or Printer required an integrated logic or common control equipment. This service was provided for the New York State Police, and other potential customers, under either of two rate options.

Option 1 calls for a modest installation charge and regular monthly rental subject to increase, with a minimum one year rental. Option 2, a form of two tier pricing, has no installation charge, and monthly charges for the first year at two and one-half times the Option 1 level, but at only 80 percent of Option 1 rates thereafter. The option 2 rates do not consist of "A" and "B" parts, are subject to increase, and employ the same rate base and provide the same service life revenue expectations as Option 1 rates. The primary purpose of the higher first year rates was to allow potential subscribers to obtain the benefits of Federal agency funding plans.

Tariff revisions were put into effect on November 27, 1974, permitting the use of this equipment on exchange service lines in addition to the Data Schedule 4 leased channels under Option 1 rates only (See November 19, 1974 Session, Item 507).

The rates and charges for DATASPEED 40 terminal equipment were predicated on earning 10.5 percent return on an account average depreciated cost base (of .525 of initial cost) using

company estimated maintenance and depreciation expenses which depart from account averages. Approximately one-half the customary account average maintenance factor was assigned as the equipment used for these services is "state of the art" modules made up of solid-state circuit boards equipped for individual testing and rapid replacement. Nearly one and one-half times customary depreciation expenses were assigned on the basis of a high probability of technological obsolescence. Capital is to be fully recovered in eight years.

In compliance with the Commission's Opinion and Order in Case 26775, rates and charges of these existing DATASPEED 40 Services were uniformly increased by 25 percent on November 1.

Proposal

On October 15, 1975, New York Telephone Company issued tariff revisions to become effective November 15, 1975 providing for a redesignation of existing DATASPEED 40 Services as Asynchronous Services and introducing new Synchronous Services. The Synchronous Services will be used by customers with requirements for multiple displays or printers at one location for transmission over Data Schedule 4 leased channels via 200 Series Data sets.

Synchronous Services will permit up to 24 Keyboard Displays (KD's) and 12 printers to be controlled by common equipment, thereby providing substantial economies of scale in many prospective situations by reducing the cost of control logic and the number of data sets and circuits required. In addition to their ability to reduce common logic, data set and

circuit costs per location, the Synchronous Service devices will transmit at fixed speeds of 2,400 or 4,800 bits per second as compared to the lesser 1,200 bits per second speed of the Asynchronous Service devices.

The Asynchronous Services market is limited to message oriented systems between dispersed multiple locations (i.e., police information networks) over leased channels, or by time sharing data customers, or remote terminals of customers over the regular exchange network where the volumes of information are relatively low and multiple displays, etc. per terminating location are not required.

The larger Synchronous Service market, on the other hand, will provide multiple display and printing for customer information bureaus, airline reservation systems, order entry systems, and inquiry/response and message switching systems. The brokerage, large retail, financial, airline and utility industries all require multiple display/printer services. These industries lend themselves to the economy of shared controller, data set, and circuit configurations which are unobtainable in the stand alone Asynchronous Service market.

The company's proposal also includes optional feature offerings which will be provided to both Asynchronous and Synchronous Service customers. These include a tractor feed feature for use with a printer, and a related paper accumulating rack which will provide for multiple production of printouts (to six copies) by use of particular multiple copy print paper.

The proposed rates and charges for each item of equipment are shown on Attachment I, a newspaper notice of the proposal.

Sales and Revenue Expectations

Two types of controller systems are being introduced. The standard cluster controller arrangement will permit the use of up to a maximum 24 Keyboard Displays (KD's) and 12 printers. A mini-cluster controller will provide for a maximum two displays and one printer.

The company has forecast first year sales of 52 standard cluster controller systems, and 98 mini-cluster controller systems; to serve a total of 460 KD's and 115 printers. Installation charges for these estimated volumes, including the new optional feature subscriptions, would account for \$124,775 and the annualized recurring charges would produce \$1,405,122 in additional revenue, exclusive of data set and circuit revenues.

Revenue Requirement/Rate of Return

The company has rated these new DATASPEED 40 items of equipment to yield a minimum 12.45 percent return of average depreciated cost (now .608 of initial cost) based on its estimates of below average maintenance and above average depreciation expenses. Its maintenance estimates range per unit from 5.9 to 6.2 percent of first cost for the various control equipments, to 11.2 percent on the keyboard display units, and 33.1 percent for printers. (Account average teletype maintenance is 26.04 of first cost.) Service and location life estimates on all of these items of equipment represent substantial acceleration of capital recovery. The resultant annual depreciation expenses of 12.8 percent on apparatus and 28.3 percent on installation compare with account average expenses of 7.3 and 16.1 percents respectively. While these departures from account average experience are not

based on factual experience, they substantially conform with all prior representations of DATASPEED 40 expense levels.

Competitive Considerations

IBM Corporation has inquired into the proposed tariffs and their supportive data (on October 30, 1975), and was advised of the scheduled report date for this memorandum. This is noted to alert the Commission to potential complaints that this is data processing rather than telephone service.

Repeating what we stated upon the introduction of DATASPEED 40 Service; we are of the opinion that DATASPEED 40 is functionally similar to existing teletype services and as such constitutes basic telephone service. If IBM does file a formal complaint in this regard, evaluation of the material presented will be required prior to any recommendation to the Commission.

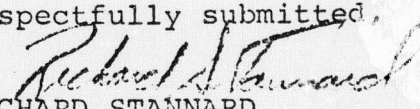
Newspaper Publication

Newspaper publication of the proposed revisions commenced October 24, 1975 and will be completed November 14, 1975. Proof of publication will be forwarded thereafter.

Recommendation

It is recommended that the proposed revisions be permitted to become effective on November 15, 1975.

Respectfully submitted,


RICHARD STANNARD
Chief of Communications
Tariffs and Rates

APPROVED:

NEIL A. SWIFT
Director of Communications Division

FJH/ds

New York Telephone Company

NOTICE OF PROPOSED CHANGE IN TELEPHONE RATE SCHEDULES

Notice is hereby given that the following proposed rate schedule has been filed with the Public Service Commission to become effective on November 15, 1975.

Introduction of Synchronous Private Line DATASPEED-40 Service.

Synchronous Private Line DATASPEED-40 Service is furnished for communication between a subscriber-provided computer and DATASPEED-40 stations. Synchronous DATASPEED-40 Data stations provide facilities which may be used by a customer for entering, storing, displaying, editing, printing and sending and receiving data in a private line system. This equipment sends and receives at fixed speeds of 2400 or 4800 bits per second in sequence over 4-wire Data Schedule 4 leased channel facilities. 200 Series data sets are required at the computer and station locations.

Equipment	Monthly Rate	Installation Charge
(a) Devices		
Keyboard and Display monochrome, combined sending and receiving		
—with attached Keyboard (4TQ)	\$ 49.00	\$ 75.00*
—with unattached Keyboard (4TP)	68.00	75.00*
Friction Feed Printer monochrome or upper lower case (4TR)	110.00	125.00*
(b) Cluster Controllers		
Station Cluster Controller, to provide control of up to six Device Cluster Controllers.		
—control of first four		
Device Cluster Controllers (4TT)	160.00	150.00
—control of two additional		
Device Cluster Controllers (4TU)	18.00	None
Device Cluster Controller, to provide control of up to six devices in response to signals from a Station Cluster Controller		
—control of first two devices (4TV)	160.00	325.00
—control of four additional devices (4TW)	34.00	None*
Mini-Cluster Controller, to provide control of up to three devices		
—control of one Keyboard and		
Display and one Printer Device (4TX)	150.00	200.00
—control of one additional device (4TY)	23.00	None**
(c) Optional Equipment		
Upper-lower case on Keyboard and Display Device (4TQ)	3.00	None**
Tractor Feed feature for use with a Printer (4TL)	22.00	None
—Paper Accumulating Rack, each (4TN)	3.00	None
—Additional form feed belts, each	None	10.00
Pedestal, each (4TM)	7.75	None

(d) Charges based on cost apply for any subsequent change in field options

- *The minimum charge is the monthly rate for 12 months plus the installation charge.
- †An additional installation charge of \$75.00 applies if installed subsequent to the initial installation.
- ‡An additional installation charge of \$225.00 applies if installed subsequent to the initial installation of the associated controller.
- An installation charge of \$160.00 applies if installed subsequent to the initial installation of the associated controller.
- An installation charge of \$120.00 applies if installed subsequent to the initial installation of the associated controller.
- An installation charge of \$375.00 applies if installed subsequent to the initial installation of the associated controller.
- Charges based on cost apply if installed subsequent to the initial installation of the associated device.
- Scheduled rates and charges also apply for the associated printer. When added to an existing printer, the installation charge of the printer applies and a new 12 month minimum applies. The subscriber is liable for the unexpired portion of the original minimum charge.
- Registered Trademark of A.T. & T.

NEW YORK TELEPHONE COMPANY

TU Oct 24, 31, Nov 7, 14-4T

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL BUSINESS MACHINES	)	
CORPORATION, <u>et al.</u> ,	)	
Petitioners,	)	
v.	)	Nos. 77-4005
	)	77-4020
FEDERAL COMMUNICATIONS COMMISSION	)	77-4059
and UNITED STATES OF AMERICA,	)	
Respondents,	)	
	)	
AMERICAN TELEPHONE AND	)	
TELEGRAPH COMPANY, <u>et al.</u> ,	)	
Intervenors.	)	

CERTIFICATE OF SERVICE

I, Mary C. Ross, hereby certify that the foregoing printed "Brief for Respondents" was served this 13th day of June, 1977, by mailing true copies thereof, to the following persons at the addresses below:

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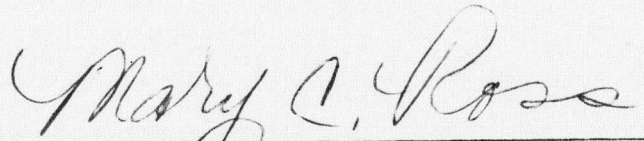
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Mary C. Ross

